



Thereafter the parties scheduled and conducted depositions of each of their respective experts in November and December 2006. Of significance for this motion, on November 28, 2006, DIG conducted the deposition of Michael Deale relating to his August 11, 2006 expert report and the basis of his analyses and opinions presented in that report.

A critical and specific area that Mr. Deale was questioned about, and which he plainly and emphatically testified was that after his complete review and analysis of certain websites at issue, he identified only two lines of code within an DIG website that apparently were copied from a Consulnet website. More specifically, Mr. Deale testified:

Q. Did that show up – that – the code show up, what's shown on Figure 2, in any other portions of BradBuzby.com? From what I'm looking at, focusing on the May 30 version of BradBuzby.com?

A. No. This line of code appears in exactly one file and that is the file B1.php.htm.

Q. You testified earlier you looked through, I think you said, a half dozen or so files from – of BradBuzby.

A. Correct. I opened and looked at –

Q. Code?

A. -- via View Source, code technique, as we were describing, maybe a half-dozen of these files.

Q. And you didn't see this in any one of those?

A. No, I did not.

Q. Do you know if it was in any of the other files from BradBuzby from May 30?

A. I know that it was not in any of the other files. I know it was not.

Q. How do you know that?

A. Because I did a search across all these files for the CraigProctor.com.

Q. You searched for CraigProctor.com?

A. That is correct.

Q. Did you search for anything else?

A. I probably searched for a couple of dozen terms.

Q. And which ones?

A. It could have been even more. You can safely assume that it was the names of many of the different web sites of ConsulNet, and any term I could come up with while doing searches that may or may not have been associated with ConsulNet to see if there were any other artifacts indicating the copying of ConsulNet code.

Q. And you found none?

A. I did not.

Q. Did you search for trim.JS?

A. I did.

Q. Nothing there, either?

A. That is correct.

(See Exh. A, Excerpt of 11.28.06 Dep. Transcript of M. Deale) (emphasis added).

Mr. Deale's timely report of August 11, 2006, and his deposition testimony relating to that report, as well as his underlying analysis were complete and emphatic. With respect to his analysis and review into whether other Consulnet code was allegedly copied by DIG, he specifically testified that he looked for "any term I could come up with while doing searches that may or may not have been associated with ConsulNet to see if there were any other artifacts

indicating the copying of ConsulNet code.” (Emphasis added). This is the information, evidence, and expert opinion that DIG reasonably relied upon.

Almost six weeks *after the deposition of Mr. Deale*, and almost five months after the deadline for submitting expert reports, Consulnet created a whole new report from Mr. Deale that attempts to recant critical section of his original report and is contradictory to his deposition testimony relating to that original timely report. The late submission of a new Mr. Deale report is first, highly prejudicial to DIG, and second, is highly suspect given the original analysis, report, and testimony of Mr. Deale. Accordingly, DIG moves the Court to preclude Consulnet’s reference to, use of, or introduction into evidence of the late filed expert report of Mr. Deale.

## **II. Argument**

### **A. The Legal Standard for Exclusion of Evidence**

The standard for the consideration of a motion in limine provides that the Court should grant such motions if the Court finds that (a) the material or evidence will be inadmissible at trial under the Federal Rules of Evidence; or (b) the evidence, if offered or presented at trial, would unfairly prejudice the decision making and review undertaken by the jury.

Evidence, including proposed expert reports, may be excluded if it is untimely, unfairly prejudicial, or if such evidence is likely to confuse the issues or jury. Fed.R.Civ.P. 37(c); Fed.R.Evid. 403. With respect to Rule 403 analysis, the Court should “balance the genuine need for the challenged evidence against the risk that the information will confuse the jury and delay trial.” *In re Paoli R.R. Yard PCB Litigation*, 113 F.3d 444, 453 (3d Cir. 1997) (citing *United States v. Sriyuth*, 98 F.3d 739, 747-48 (3d Cir. 1996).

**B. The Late Submitted January 2007 Expert Report  
Of Mr. Deale Should Be Excluded From Evidence**

Consulnet provided timely three expert reports on August 11, 2006, including that of Mr. Deale. Thereafter, DIG submitted its rebuttal expert reports, including the report of Mr. Patrick O'Leary relating to website code comparisons. Consulnet and its experts had the opportunity to review and analyze the rebuttal reports submitted by DIG. At no time during this process or review, did Consulnet request an extension of time to allow for further analysis of discovery or evidence. At no time after the submission of DIG's rebuttal expert reports did Consulnet seek the opportunity to submit a reply or rebuttal expert report. Indeed, it was not until after the completion of expert depositions, and after the completion of discovery did Consulnet then attempt to submit a whole new expert report of Mr. Deale.

As noted, the late submitted report is inconsistent with Mr. Deale's original timely report and inconsistent with his deposition testimony that was elicited six weeks before the creation of his new report. This makes the late report by Mr. Deale suspect on its face. In that regard, Consulnet can not, as any justification for the late submission, claim that it and Mr. Deale did not have access to all of the necessary evidence. All evidence reviewed by Mr. Deale was completely in the possession of Consulnet and Mr. Deale well before the August 11 deadline for submission of expert analyses. They just decided to wait until after the close of discovery and after the completion of expert depositions to submit a new report.

The new report created by Mr. Deale and Consulnet well after the deadline for submitted expert reports should be precluded from use or admission at trial. To allow Consulnet's use of the late submitted report of Mr. Deale is highly prejudicial to DIG, which reasonably relied on the original timely submission and deposition testimony of Mr. Deale.

### **III. Conclusion**

For the reasons set forth above, defendants DIG respectfully request that the Court enter an Order, in a form as attached to this Motion, precluding plaintiff Consulnet from referring to, using, or introducing into evidence at trial, the January 9, 2007, late submitted expert report of Michael Deale.

Respectfully submitted,

/s/ Kevin W. Goldstein

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Dated: March 25, 2008

# Exhibit A

1           IN THE UNITED STATES DISTRICT COURT  
2           FOR THE EASTERN DISTRICT OF PENNSYLVANIA

3           CONSULNET COMPUTING       : CIVIL ACTION  
4           INC., d/b/a                : NO.04-CV-3485  
5           SUCCESSWEBSITE,         :  
6                                       Plaintiff       :

7                                       vs.             :  
8                                       :  
9                                       :  
10                                      :  
11           MEGEL DAVID MOORE,       :  
12           et al,                    :  
13                                      Defendant     :

14                                      -   -   -  
15                                      November 28, 2006  
16                                      -   -   -

17                                      Oral deposition of MICHAEL  
18           J. DEALE, was held at the Law Offices of  
19           Stradley Ronon, 2600 One Commerce Square,  
20           2005 Market Street, Philadelphia,  
21           Pennsylvania, commencing at 10:10 a.m.,  
22           on the above date, before Sheila G.  
23           Malen, a Registered Professional Reporter  
24           and Notary Public in and for the  
            Commonwealth of Pennsylvania.

                                    -   -   -  
                                    ESQUIRE DEPOSITION SERVICES

                                    Four Penn Center

            1600 John F. Kennedy Boulevard, Ste. 1210  
            Philadelphia, Pennsylvania 19103

                                    (215) 988-9191



<p>2</p> <p>1 APPEARANCES:</p> <p>2</p> <p>3 WOLF BLOCK</p> <p>4 BY: DAVID E. LANDAU, ESQUIRE</p> <p>5 BY: MATTHEW R. VARZALLY, ESQ.</p> <p>6 1650 Arch Street</p> <p>7 22nd Floor</p> <p>8 Philadelphia, Pennsylvania</p> <p>9 19103-2097</p> <p>10 (215) 977-2000</p> <p>11 dlandu@wolfblock.com</p> <p>12 mvarzally@wolfblock.com</p> <p>13 Counsel for Plaintiff</p> <p>14</p> <p>15 STRADLEY RONON</p> <p>16 BY: KEVIN W. GOLDSTEIN, ESQUIRE</p> <p>17 Great Valley Corporate Center</p> <p>18 30 Valley Stream Parkway</p> <p>19 Malvern, Pennsylvania 19355-1481</p> <p>20 (610) 640-5800</p> <p>21 kgoldstein@stradley.com</p> <p>22 Counsel for Defendants</p> <p>23</p> <p>24</p> <p>ALSO PRESENT:</p> <p>Patrick M. O'Leary</p>	<p>4</p> <p>1 ---</p> <p>2 (It is hereby stipulated by</p> <p>3 and between counsel that the</p> <p>4 sealing, certification and all</p> <p>5 objections except as to form are</p> <p>6 hereby waived until the time of</p> <p>7 trial.)</p> <p>8 ---</p> <p>9 MICHAEL J. DEALE, after</p> <p>10 having first been duly sworn, was</p> <p>11 examined and testified as follows:</p> <p>12 ---</p> <p>13 EXAMINATION</p> <p>14 ---</p> <p>15 BY MR. GOLDSTEIN:</p> <p>16 Q. Good morning, Mr. Deale.</p> <p>17 My name is Kevin Goldstein. I'm counsel</p> <p>18 for defendants in this case, David Moore</p> <p>19 and Dynamic Investment Group. We met</p> <p>20 before. We're here today to take your</p> <p>21 deposition.</p> <p>22 Kind of by way of background</p> <p>23 and just administrative issues, have you</p> <p>24 had your deposition taken before?</p>
<p>3</p> <p>1 INDEX</p> <p>2 MICHAEL J. DEALE</p> <p>3 BY: Mr. Goldstein 4</p> <p>4</p> <p>5</p> <p>6</p> <p>7 EXHIBITS</p> <p>8</p> <p>9 NO. DESCRIPTION PAGE</p> <p>10 Deale-1 Expert Report of 108</p> <p>11 Michael J. Deale</p> <p>12 Raitt-2 Referred to 75</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p>5</p> <p>1 A. No.</p> <p>2 Q. This is your first</p> <p>3 deposition?</p> <p>4 A. Yes.</p> <p>5 Q. Let me give you a couple of</p> <p>6 instructions. I'm sure counsel has told</p> <p>7 you something similar. I just want to</p> <p>8 make sure we're getting down good</p> <p>9 information and correct information.</p> <p>10 The deposition, as you</p> <p>11 probably know because you sat in on</p> <p>12 Mr. Crosley's deposition, March, April, I</p> <p>13 believe?</p> <p>14 A. Yes.</p> <p>15 Q. I forget.</p> <p>16 It's a question and answer</p> <p>17 period. I have a series of questions</p> <p>18 I'll be asking you today, primarily about</p> <p>19 your expert report, which was submitted</p> <p>20 in this case, and you'll be giving me the</p> <p>21 answers as best you can. If during the</p> <p>22 deposition, some of my questioning, you</p> <p>23 don't hear me, let me know. If I stumble</p> <p>24 over words or if I use words that don't</p>


<p style="text-align: right;">154</p> <p>1 <b>trim.JS.</b></p> <p>2 Q. You have a copy of trim.JS</p> <p>3 on Page 7; is that correct?</p> <p>4 A. <b>That's correct.</b></p> <p>5 Q. You describe trim.JS as</p> <p>6 being the function of removing leading</p> <p>7 and trailing spaces. Actually, you say</p> <p>8 the JavaScript provides three functions</p> <p>9 to remove leading and trailing spaces.</p> <p>10 What are the three functions it does?</p> <p>11 A. <b>The three functions defined</b></p> <p>12 <b>on Figure -- in Figure -- as shown in</b></p> <p>13 <b>Figure 3, R trim, L trim, and trim.</b></p> <p>14 Q. And what does the R trim do?</p> <p>15 The purpose here, it says remove trailing</p> <p>16 blanks?</p> <p>17 A. <b>Correct. R stands for right</b></p> <p>18 <b>trim, which would be blanks from the end</b></p> <p>19 <b>of the string.</b></p> <p>20 Q. L trim does?</p> <p>21 A. <b>Remove blanks from the</b></p> <p>22 <b>beginning of the string, left trim.</b></p> <p>23 Q. And the trim function at the</p> <p>24 bottom?</p>	<p style="text-align: right;">156</p> <p>1 Q. And you didn't see this in</p> <p>2 any one of those?</p> <p>3 A. <b>No, I did not.</b></p> <p>4 Q. Do you know if it was in any</p> <p>5 of the other files from BradBuzby from</p> <p>6 May 30?</p> <p>7 A. <b>I know that it was not in</b></p> <p>8 <b>any of the other files. I know it was</b></p> <p>9 <b>not.</b></p> <p>10 Q. How do you know that?</p> <p>11 A. <b>Because I did a search</b></p> <p>12 <b>across all these files for the</b></p> <p>13 <b>CraigProctor.com.</b></p> <p>14 Q. You searched for</p> <p>15 CraigProctor.com?</p> <p>16 A. <b>That is correct.</b></p> <p>17 Q. Did you search for anything</p> <p>18 else?</p> <p>19 A. <b>I probably searched for a</b></p> <p>20 <b>couple of dozen terms.</b></p> <p>21 Q. And which ones?</p> <p>22 A. <b>It could have been even</b></p> <p>23 <b>more. You can safely assume that it was</b></p> <p>24 <b>the names of many of the different web</b></p>
<p style="text-align: right;">155</p> <p>1 A. <b>It removes spaces from the</b></p> <p>2 <b>front and the back of the string using</b></p> <p>3 <b>the implementations of R trim and L trim.</b></p> <p>4 Q. Is it used at all in</p> <p>5 BradBuzby.com?</p> <p>6 A. <b>No.</b></p> <p>7 Q. Did that show up -- that --</p> <p>8 the code show up, what's shown on</p> <p>9 Figure 2, in any other portions of</p> <p>10 BradBuzby.com? From what I'm looking at,</p> <p>11 focusing on the May 30 version of</p> <p>12 BradBuzby.com?</p> <p>13 A. <b>No. This line of code</b></p> <p>14 <b>appears in exactly one file and that is</b></p> <p>15 <b>the file B1.php.html.</b></p> <p>16 Q. You testified earlier you</p> <p>17 looked through, I think you said, a half</p> <p>18 dozen or so files from -- of BradBuzby.</p> <p>19 A. <b>Correct. I opened and</b></p> <p>20 <b>looked at --</b></p> <p>21 Q. Code?</p> <p>22 A. <b>-- via View Source, code</b></p> <p>23 <b>technique, as we were describing, maybe a</b></p> <p>24 <b>half-dozen of these files.</b></p>	<p style="text-align: right;">157</p> <p>1 sites of ConsulNet, and any term I could</p> <p>2 come up with while doing searches that</p> <p>3 may or may not have been associated with</p> <p>4 ConsulNet to see if there were any other</p> <p>5 artifacts indicating the copying of</p> <p>6 ConsulNet code.</p> <p>7 Q. And you found none?</p> <p>8 A. <b>I did not.</b></p> <p>9 Q. Did you search for trim.JS?</p> <p>10 A. <b>I did.</b></p> <p>11 Q. Nothing there, either?</p> <p>12 A. <b>That is correct.</b></p> <p>13 Q. From your analysis, as I</p> <p>14 understand it, that line of code has no</p> <p>15 use within the BradBuzby code?</p> <p>16 A. <b>That's correct. As a matter</b></p> <p>17 <b>of fact, I specifically searched for L</b></p> <p>18 <b>trim, R trim and trim to see if that code</b></p> <p>19 <b>was used anywhere else.</b></p> <p>20 Q. In your analysis of the</p> <p>21 BradBuzby Teleport Pro code -- web site</p> <p>22 and code -- and I'll focus on Figure 2</p> <p>23 for now, as I understand it, you don't</p> <p>24 know if any of this code, or you don't</p>



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 25, 2008, a true and correct copy of the foregoing **Motion *in Limine* Of Defendants To Preclude The Admission Or Use Of The Late Submitted Expert Report Of Michael Deale** was served upon the below noted counsel of record via first-class mail, and was made available for viewing and copying through the Court's ECF system.

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